

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

EIGHT MILE STYLE, L.L.C., et al,

Plaintiffs,

-V-

Case No. 07-CV-13164

APPLY COMPUTER, INC., et al,

## Defendants. /

PLAINTIFFS' MOTION TO COMPEL DISCOVERY  
BEFORE THE HONORABLE DONALD A. SCHEER

United States Magistrate Judge  
648 U.S. Courthouse  
231 West Lafayette  
Detroit, Michigan 48226

(Thursday, June 12, 2008)

APPEARANCES: HOWARD HERTZ, ESQUIRE  
RICHARD S. BUSCH, ESQUIRE  
Appearing on behalf of the  
Plaintiffs.

DANIEL D. QUICK, ESQUIRE  
KELLY M. KLAUS, ESQUIRE  
Appearing on behalf of the  
Defendants.

TRANSCRIBED BY: MARIE METCALF, CSMR, CVR, CM  
Official Court Reporter  
267 U.S. Courthouse  
231 W. Lafayette  
Detroit, Michigan 48226  
(313)962-3832

21

22

23

24

35

*EIGHT MILE STYLE v. APPLE COMPUTER*

**TABLE OF CONTENTS**

Proceedings - Thursday, June 12, 2008

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

*EIGHT MILE STYLE v. APPLE COMPUTER*

Detroit, Michigan

Thursday, June 12, 2008

At about 3:04 p.m.

\* \* \*

DEPUTY COURT CLERK: Please rise.

United States District Court for the Eastern District of Michigan is now in session, the Honorable Donald A. Scheer, United States Magistrate Judge, presiding.

The Court calls case number 07-13164,

## Eight Mile Style vs. Apple Computer.

THE COURT: Good afternoon.

MR. KLAUS: Good afternoon, Your Honor.

MR. BUSCH: Good afternoon, Your Honor.

THE COURT: Will counsel please state appearances for the record?

MR. BUSCH: Richard Busch, on behalf of  
Eight Mile Style.

MR. HERTZ: Howard Hertz, on behalf of  
Eight Mile Style.

MR. KLAUS: Kelly Klaus, on behalf of the defendants

MR. QUICK: Dan Quick for the defendants.

THE COURT: Thank you. Please be seated.

*EIGHT MILE STYLE v. APPLE COMPUTER*

1                   We are here pursuant to an order of  
2 reference from Judge Taylor for consideration of  
3 Plaintiff's Motion to Compel Discovery. I've looked at  
4 the motion, response and the list of unresolved issues.

5                   Has anything additional been resolved  
6 since the delay of the hearing?

7                   MR. BUSCH: Yes, Your Honor, we have  
8 resolved a few of the issues and we have not resolved  
9 several of the issues. And if it would be all right  
10 with Your Honor, I can just go through and -- on behalf  
11 of the plaintiffs and go through our points and take it  
12 one by one.

13                  THE COURT: Any objection, Mr. Klaus?

14                  MR. KLAUS: No, Your Honor. I think  
15 that -- I believe that just as a supplement to what Mr.  
16 Busch has said, I think we have remaining between us  
17 three live issues that were identified and ensconced in  
18 the statement and then we've also got an issue that  
19 we've been discussing with respect to one of the  
20 130(b)(6) notices that was mentioned at the end. And  
21 we may want to take that up separately.

22                  But I think there are -- there are two  
23 deponents and one interrogatory that I think we've got by  
24 my count.

25                  MR. BUSCH: I'm not certain that's

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 right. I'd just like to go through it one by one and  
2 make sure --

3 THE COURT: You may proceed.

4 MR. BUSCH: Thank you, Your Honor. And  
5 I've got the list of unresolved issues documented in  
6 front of me and I'll just take it point by point with  
7 respect to that.

8 THE COURT: Thank you.

9 MR. BUSCH: Your Honor, I think it's  
10 important -- just a very bit of background, just so  
11 that Your Honor understands the nature of the case a  
12 little bit and the issues that we are disputing.

13 Essentially, Your Honor, this case  
14 involves the contention of Eight Mile Style that Apple  
15 has not obtained what is called a mechanical license,  
16 which allowed its compositions to be sold on I-Tunes from  
17 Eight Mile Style.

18 Aftermath, which is part of Universal,  
19 intervened in the case on the grounds that a sister  
20 company of Eight Mile Style called FBT Productions, which  
21 has rights in what's called the master recording. Master  
22 recording is the sound, the tape, the recording. The  
23 composition is the underlying musical work. That they  
24 have a contract with FBT.

25 And in that contract there's what's called

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 a controlled composition clause, and that under the  
2 controlled composition clause, it had the right to make  
3 the master and the composition available to Apple and  
4 Apple did not have to get a direct license from Eight  
5 Mile Style.

6 It is Eight Mile Style's position that  
7 that controlled composition clause does not apply to  
8 Apple or to licenses, does not give Universal the right  
9 to license the composition to Apple. And it is Eight  
10 Mile Style's position that there is no separate license  
11 that Universal or Aftermath could have used to pass  
12 through the right to use the composition to Apple.  
13 Rather, Apple had to get a separate license directly from  
14 Eight Mile Style.

15 So that's the dispute. On the one hand,  
16 Universal says, "We have the control of what's called the  
17 controlled composition clause and we're allowed to make  
18 use of that to make the songs available to Apple without  
19 Apple having to come to you, Eight Mile Style."

20 And it's our position that that controlled  
21 composition clause does not apply and that Apple had to  
22 get a license directly from us.

23 So that's the dispute in the case and that  
24 gives rise to many of the discovery issues that we'll be  
25 talking about here today.

*EIGHT MILE STYLE v. APPLE COMPUTER*

1                   Item number six, Interrogatory Number Six,  
2    asks Apple to disclose what the basis is for their belief  
3    that they have the right to basically make the  
4    composition available without obtaining a license from  
5    Eight Mile Style.

6                   And it is our position that Apple should  
7    so state. The defendants have objected to answering that  
8    interrogatory, but Apple should be required to say  
9    whether they have a license from Universal or Aftermath.  
10   They can either say, "Look, we have a license for the  
11   publishing from Aftermath or from Universal, and where  
12   they sub-licensed it to us, Apple."

13                  Or they can say, "We're just a reseller.  
14    We're a seller of music and we don't need a license. We  
15    got the right to reproduce the master recording, and as a  
16    result of that, we don't need a license because we're  
17    just a reseller of goods."

18                  Because one of their positions in another  
19    case is that they're just a reseller of the music and  
20    they're not a licensee. So we want to know, is your  
21    basis for making these compositions available, is it  
22    based upon your status as a licensee or are you saying  
23    you don't need a license, one or the other.

24                  The defendants are refusing to answer that  
25    question or saying they answered it in connection with

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 another interrogatory, which we believe evades the point.  
2 And we just want a direct answer to that question. And  
3 that item still remains open between the parties.

4 THE COURT: Thank you. Mr. Klaus?

5 MR. KLAUS: Thank you, Your Honor. Just  
6 briefly, on the background of the case, in terms of  
7 what the dispute is between the parties, we think it's  
8 important to note that there's -- the defendants  
9 actually have a -- filed a Summary Judgment Motion that  
10 is before Judge Taylor. There is an opposition brief  
11 that is due from plaintiffs in a couple of weeks.

12 But the argument that is made by the  
13 defendant is not simply that there was a controlled  
14 composition clause. In fact, the controlled composition  
15 clause was not just by this company called FBT, which is  
16 owned by exactly the same -- the same individuals who own  
17 the plaintiff Eight Mile Style in this case.

18 But was a controlled composition clause  
19 executed by the artist himself, who was -- who has  
20 admitted by the plaintiffs to be an author of the  
21 compositions and who, therefore, have the right to do it,  
22 and that is Marshall Mathers or Eminem. So there is an  
23 express controlled composition clause. There have been  
24 individual agreements that the plaintiffs in the case  
25 have executed with respect to these compositions, which

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 it's our position, even if the first express  
2 authorization didn't grant the right, these would have.

3 And the third is, that there's also a  
4 doctrine in copyright law called implied license, that  
5 says that, where, as here, you have a party that has  
6 stood by and has accepted royalty payments for years.  
7 The songs that are at issue here have been disseminated  
8 over the I-Tunes service, which is very well known, for  
9 years, going back to 2003, that if a party acts in  
10 accordance with the belief that there is in fact a  
11 license and accepts money for it, that there is a license  
12 implied as a matter of law. So there are multiple  
13 grounds on which we've moved for summary judgment and  
14 that is pending.

15 With respect to Interrogatory Number Six,  
16 the first thing that I would say in response to Mr. Busch  
17 is, he said that what his question was was, "Why is it  
18 that you, Apple, believe you don't need to have a license  
19 from us?"

20 That is not the interrogatory that Mr.  
21 Busch actually drafted. The interrogatory that he  
22 actually drafted and served, and that we objected to, had  
23 to do with the basis for your belief that Apple has the  
24 right to synchronize with images the Eminem compositions.  
25 Synchronizing with images is a particular right under the

## *EIGHT MILE STYLE v. APPLE COMPUTER*

1 copyright act and that is not at issue in the complaint.

2 Transmit, which is not a defined term, but  
3 appears to be the same thing as publically perform or  
4 broadcast, also is not at issue in the complaint, because  
5 that's not what Apple does, or we produce lyrics of the  
6 Eminem compositions. It's undisputed that I-Tunes  
7 doesn't reproduce lyrics, and so that particular right  
8 isn't at issue.

9 And what we had said to Mr. Busch during  
10 the meet and confer was, "That's not the interrogatory  
11 that you drafted. The interrogatory that you drafted  
12 doesn't have anything to do with the allegations that are  
13 in the complaint."

14 And if he'd wanted to draft a new  
15 interrogatory, it was his burden to go and draft -- to go  
16 and draft one that was more clear.

## *EIGHT MILE STYLE v. APPLE COMPUTER*

license, authorize or otherwise grant Apple the right to reproduce, distribute and sell downloads of the sound recordings."

And what's stated is, by Apple, is that "Our agreements provide that we are a reseller. Our agreements provide that we are a reseller and we rely on the label, in this case, Universal, to be responsible for obtaining what are called the mechanical rights to the composition."

There is no great mystery here as to what the nature of the arrangement is or why it is that we contend that Apple has the right to resell the sound recordings with the compositions.

MR. BUSCH: Your Honor, if I may just respond briefly?

THE COURT: You may.

MR. BUSCH: First of all, our Interrogatory Number Six was drafted very broadly to cover every possible item that Apple might be doing, and transmit was a broad way of saying, to make available for digital download. That's why we have the right to "synchronize images, transmit, publically perform, or reproduce lyrics of the Eminem compositions." It was drafted broadly to encompass every possible thing that Apple did.

## *EIGHT MILE STYLE v. APPLE COMPUTER*

11 So I've agreed to do that. I've agreed to  
12 take that. And Aftermath's answer is not Apple's answer.  
13 And I would like Apple to answer the question  
14 specifically on what basis. If they want to say that  
15 they are simply a reseller and they don't need a license,  
16 let them say that. If they believe they have a  
17 sublicense from Universal or Aftermath, they can say that  
18 too. It's a very simple, straightforward interrogatory  
19 and we'd ask that it be answered.

20 THE COURT: So you have employed in your  
21 rebuttal the formulation, "make available for permanent  
22 download." Is that construction included in the  
23 language employed in Interrogatory Number Four, as Mr.  
24 Klaus suggests?

25 MR. BUSCH: Interrogatory Number Four to

*EIGHT MILE STYLE v. APPLE COMPUTER*

1            Aftermath -- Interrogatory Number Four to Aftermath  
2            says,

5 which is defined as part of Aftermath,

6 "has the authority to license

10 recordings."

11 So it relates to sound recordings as opposed to  
12 compositions. This gets to the compositions that are at  
13 issue.

14 So again, we would be more than satisfied  
15 with an answer to the question, "On what basis Apple  
16 claims to have the right to make available for download  
17 or sell downloads that contain the Eminem compositions?"

18 MR. KLAUS: The only thing that I would  
19 point out is that Interrogatory Number Four, Mr. Busch  
20 suggested that this was limited to the authorization  
21 for sound recordings. What it actually says is, "Sound  
22 recordings of the Eminem composition." It's the  
23 composition -- there are two separate -- and the reason  
24 for the confusion, Your Honor, is -- in case either one  
25 of us is not clear, every song, every popular song has

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 two separate copyrights bound up within it. One in the  
2 actual recording, one in the composition. And this  
3 case deals with the composition rights.

4 THE COURT: But Interrogatory Four, as I  
5 read it, deals with sound recordings.

6 MR. KLAUS: It says it's sound  
7 recordings of the compositions, which is --

8 THE COURT: Which is sound recordings as  
9 far as I'm concerned. So the question that the  
10 plaintiff now wants answered is not asked.

11 MR. BUSCH: Oh, it is, in Interrogatory  
12 Number Six. That's the one that we're talking about,  
13 is Interrogatory Number Six. They pointed to  
14 Interrogatory Number Four and are saying, "Well, we  
15 answered it through Interrogatory Number Four."

16 THE COURT: Which word or phrase in  
17 Interrogatory Number Six is the functional equivalent  
18 of your formulation, quote, make available for  
19 permanent download?

20 MR. BUSCH: "Transmit," Your Honor.

21 THE COURT: And what is the basis for  
22 your equivalence?

23 MR. BUSCH: Because they are -- what is  
24 happening is that Apple is transmitting to the public  
25 the compositions for purposes of permanent downloads.

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 That's the transmission that is occurring. And that's  
2 why we drafted it as broadly as possible, to encompass  
3 every potential act that Apple did, inclusive of the  
4 transmission.

5 THE COURT: It's going to be a long  
6 afternoon.

7 MR. KLAUS: The only thing I would say  
8 on the transmission issue, we've been meeting and  
9 conferring on the -- we first met and conferred on  
10 these several months ago, Your Honor. It was the first  
11 time that I -- the first time that I heard Mr. Busch  
12 say that "transmit" in the sentence was the same as  
13 "make available for download," was this afternoon, a  
14 few hours before this hearing. It was never said to me  
15 during the meet and confer process, that "transmit"  
16 covered "make available for download." It just wasn't.

17 MR. BUSCH: Your Honor, we did say, and  
18 Mr. Hertz was on the phone call with us, when we first  
19 had a meet and confer, and we absolutely did say that.

20 MR. KLAUS: And I would just say, Your  
21 Honor, in response, that the best -- the indication  
22 that it wasn't is if you look through the Motion to  
23 Compel paper and the -- and even the statement of  
24 unresolved issues, that argument isn't made anywhere.

25 THE COURT: I'm going to grant the

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 motion and direct that an answer be provided,  
2 responding to Interrogatory Number Six as it relates to  
3 the right to make available for permanent download of  
4 the composition.

5 MR. BUSCH: Thank you, Your Honor.

6 We have resolved point number 16, and as  
7 to Interrogatory Number 18, Apple has agreed to provide  
8 information to us for purposes of a deposition that we  
9 will be taking of Mr. Eddie Q (sic). So as to Apple, it  
10 has been resolved.

11 As to Aftermath, we have -- in our meet  
12 and confer process, we have narrowed the issue -- we have  
13 narrowed the issue to -- we have narrowed the issue in  
14 the meet and confer process to obtaining from Aftermath  
15 an answer as to whether they have a license from some  
16 other third party, a co-publisher of Eight Mile Style,  
17 that would allow them to make the compositions available  
18 to Apple through that agreement. They have agreed to  
19 provide us with that information.

20 THE COURT: Is that correct?

21 MR. KLAUS: With respect to Apple, there  
22 is a separate agreement for purposes of resolving this  
23 that Mr. Busch and I have laid forth. With respect to  
24 this Interrogatory Number 18 and Request For Production  
25 Number Six, which we'll get to momentarily, yes. With

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 respect to Aftermath it said that we have produced one  
2 agreement with a -- with the clause that I referred to  
3 earlier with respect to Eminem. If there are any other  
4 co-authors that we're going to rely on, we're going to  
5 provide that information and produce the agreements to  
6 Mr. Busch.

7 THE COURT: That satisfies the  
8 plaintiff?

9 MR. BUSCH: Co-authors or book  
10 publishers, just to make it clear.

11 THE COURT: Thank you. Eighteen is  
12 resolved.

13 MR. BUSCH: Interrogatory Number 19, I  
14 believe Mr. Klaus said his client would provide a  
15 supplemental response.

16 MR. KLAUS: Correct. This is directed  
17 solely to Apple, as Number 19. And what I said was  
18 that Apple would respond supplemental responses.

19 THE COURT: Nineteen is resolved.

20 MR. BUSCH: We're up to the document  
21 requests now, Your Honor. And as to the Document  
22 Request, Number Six, I believe we have the same  
23 agreement as to Document Request Number Six, as we did  
24 to Interrogatory Number 18.

25 MR. KLAUS: That's correct.

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 THE COURT: Six is resolved.

2 MR. BUSCH: Number seven has been  
3 resolved?

4 MR. KLAUS: Yes, Number Seven has been  
5 resolved. I believe plaintiffs have said they're not  
6 -- they're not continuing with Number Seven.

7 THE COURT: Seven is resolved.

8 MR. BUSCH: Number 13 has been resolved  
9 as well?

10 MR. KLAUS: Yes. Number 13 was resolved  
11 at the same time as Number Seven.

12 THE COURT: Thirteen is resolved.

13 MR. BUSCH: That brings us to discovery  
14 related to damages, Your Honor. The defendants -- as  
15 to Number 26, I'm sorry, Apple has indicated they have  
16 no such documents, and with that representation, it has  
17 been resolved, so we would just ask that they make that  
18 representation on the record.

19 MR. KLAUS: I think actually with  
20 respect to -- with respect to Number 26, this I think  
21 is the -- this was the flip side of our resolution with  
22 respect to Interrogatory Number 18, as to Apple. There  
23 is -- I think the response that we have provided, which  
24 is that Apple doesn't have any direct agreements for  
25 the compositions, remains our answer. There is an

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 outstanding issue with respect to Apple having  
2 agreements with music companies that are owned by some  
3 recording artists that will be covered at a  
4 30(b) (6) deposition that we had discussed, because I  
5 think that's the resolution with respect to both that  
6 Interrogatory and Request for Production 26.

7 MR. BUSCH: Just stated my way to make  
8 sure that Mr. Klaus and I are speaking the same  
9 language, what Apple has said to us is they have no  
10 specific mechanical licenses with third parties.  
11 However, they may have -- or they do have agreements  
12 with artists, and to the extent that would encompass a  
13 mechanical license, they will provide us with samples  
14 of those and we will be able to question a witness,  
15 simply Mr. Q about it at his deposition. And with that  
16 representation, it's resolved.

17 MR. KLAUS: Resolved.

18 THE COURT: Resolved, Number 26.

19 That brings us up to discovery related to  
20 damages.

21 MR. BUSCH: And the defendants had a  
22 motion to bifurcate that we have opposed. And we have  
23 agreed to short-circuit this to hold off on the  
24 disputes we have on this pending the resolution of the  
25 motion to bifurcate, and we have agreed that once the

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 motion to bifurcate is resolved, if the Court approves  
2 this structure, that we would be able to meet and  
3 confer on these discovery requests relating to damages  
4 and either reach a resolution or come to the Court.  
5 And whatever the Court decides as far as the  
6 breadth of the discovery, we would be allowed to take  
7 depositions or discovery related to damages at the  
8 appropriate time following the bifurcation decision.

9 THE COURT: Sounds like a deal.

10 MR. KLAUS: That's what we have decided  
11 to do.

12 THE COURT: That takes us up to  
13 deposition disputes.

14 MR. BUSCH: Yes, sir. And the first  
15 deposition dispute we have relates to -- it's the same  
16 thing, it's Leo Ferrante and Tim Hernandez. The issues  
17 are relatively similar here, and that is this. Mr.  
18 Ferrante -- let's do a -- let's start with -- let's  
19 start with the deposition of Eddie Q actually. As to  
20 the deposition of Eddie Q, that matter has been  
21 resolved on the following terms. They will make Eddie  
22 Q available for a deposition on June the 20th. The  
23 deposition will take place at Apple. It will last the  
24 afternoon, one to five, for four hours of deposition  
25 time. Mr. Q will answer the questions relating to

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 these other agreements that we have -- among other  
2 topics, the item on the agreements with the artists.

3                   We will agree that as far as the financial  
4 issues relating to Apple and a witness that relates to  
5 the financial issues, that we will also put that off  
6 pending the motion for bifurcation resolution and  
7 hopefully be able to resolve the -- a deposition of Apple  
8 on financial matters at the same time that we meet and  
9 confer on a witness for Aftermath on financial matters.  
10 And we will not require any other witness from Apple  
11 besides Mr. Q and the financial person.

12                   MR. KLAUS: And I think that fairly  
13 summarizes the agreement that we have. The one -- the  
14 caveat being a financial -- somebody to speak about the  
15 financial information at issue, if and when we get to  
16 damages discovery.

17                   MR. BUSCH: Yes.

18                   THE COURT: Eddie Q is resolved.

19                   MR. BUSCH: Now, that brings us to Leo  
20 Ferrante and Tim Hernandez. That's last.

21                   As far as Mr. Ferrante and Mr. Hernandez  
22 are concerned, they were members of Universal's copyright  
23 department at relevant times in this process. They were  
24 both identified in discovery, either through  
25 correspondence that was produced or through interrogatory

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 responses as people with information or knowledge.

2 Mr. Ferrante, some of his correspondence  
3 was produced. I believe Mr. Hernandez, his name was  
4 identified specifically, although in response to the  
5 question -- let me back up one second if I can, Your  
6 Honor.

7 One of the issues in this case is, did  
8 Eight Mile Style object to the making available of its  
9 compositions on I-Tunes? Did it advise Universal that it  
10 objected and would not sign licenses. That is a key  
11 issue in this case.

12 In response to an interrogatory that was  
13 served on us by Aftermath, which asked us to identify who  
14 we made objections to, we answered that interrogatory by  
15 saying that we made objections to various people in the  
16 copyright department, including, but not limited to --  
17 and we identified five or six people.

18 During discovery in this case, we've taken  
19 the deposition of several people from the copyright  
20 department of Universal, Pat Blair, who was the head of  
21 the department and Chad Gary, who was in the department  
22 at the relevant time, as well as Todd Douglas.

23 Mr. Ferrante and Mr. Hernandez no longer  
24 work for Universal. They are not within the control of  
25 Universal. Mr. Ferrante resides in New York and Mr.

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 Hernandez, I believe resides in Nashville, Tennessee.

2 During the course -- discovery was  
3 original scheduled to end in this case on June the 2nd.  
4 Before the deposition of Pat Blair, which was occurring  
5 -- which occurred in the last week and-a-half or so, we  
6 spoke on the record about depositions that needed to be  
7 completed. And we agreed to extend the taking of  
8 discovery through the end of June for purposes of  
9 completing depositions.

10 During the conversation that occurred, I  
11 neglected to mention Ferrante and Hernandez. And we then  
12 went back after the deposition and we were talking about  
13 it. And almost within the -- it was like a Thursday or  
14 Friday. The following week, at the beginning of the  
15 week, I e-mailed Mr. Pomerantz, Mr. Klaus' partner, and I  
16 said, "We forgot to mention Ferrante and Hernandez. We  
17 still need to depose those two people as well."

18 And Mr. Pomerantz, who is Mr. Klaus'  
19 partner, said, "Well, you didn't mention it at the  
20 deposition, so my view of it is that it's -- you don't  
21 get to do it."

22 Mr. Ferrante and Mr. Hernandez are  
23 essential to the case because they have knowledge about  
24 Eight Mile's objections. Mr. Ferrante does have  
25 knowledge about the practice in the copyright department

## *EIGHT MILE STYLE v. APPLE COMPUTER*

1 at Universal concerning sending out separate digital  
2 licenses, and we want the chance to depose them.

16 And then as far as Mr. Hernandez is  
17 concerned, he's in Nashville, and we would ask that we be  
18 allowed to take his deposition as well.

19 MR. KLAUS: A couple of points to make  
20 in response. One is, the plaintiff in this case has  
21 already taken ten depositions -- has already reached  
22 the limit of the number of depositions that it's  
23 entitled to take, exclusive of the 30(b)(6) depositions  
24 that we haven't gotten to. We've said we're not  
25 objecting on the ten -- we're not objecting on the ten

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 depo, with respect to the 30(b) (6), but the plaintiff  
2 had the opportunity to take ten depositions.

3 As was stated by Mr. Busch, three of those  
4 depositions were of people from the Universal copyright  
5 department covering exactly the same issues that he says  
6 he wants to now depose Mr. Ferrante and Mr. Hernandez on.

7 Ms. Blair, who he mentioned as being the  
8 head of the department, there was a suggestion that the  
9 testimony of these individuals might be somewhat more  
10 favorable because they no longer work for Universal. Ms.  
11 Blair no longer works for Universal. And Mr. Busch  
12 subpoenaed her and was able to take her deposition.

13 There was also a suggestion that the  
14 omission of Mr. Ferrante and Mr. Hernandez was somehow  
15 inadvertent, because it was not mentioned at the start of  
16 Pat Blair's deposition. And I have excerpts from -- I  
17 don't think there's any dispute. They weren't mentioned  
18 as somebody that the plaintiff was reserving its right to  
19 depose at the deposition, but there wasn't just a -- it  
20 wasn't just a five-minute discussion there, where the  
21 parties set forth their understanding of what the limited  
22 extension of the discovery cut-off in the case would be.

23 The parties also filed a stipulation  
24 regarding the extension of the discovery. And the  
25 stipulation, which has not been entered, but which was --

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 or I'm sorry. There was nothing -- Judge Taylor has not  
2 signed the order yet. But the stipulation refers to the  
3 agreement, and it says,

11 And therefore, if there was -- there was another chance  
12 for reflection before the stipulation to say, "Oh, yeah,  
13 I forgot."

14 Our position is there had been more than  
15 enough depositions in this case. There had been  
16 depositions of -- the depositions that Mr. Busch wants to  
17 take here is to go over ground that he's already gone  
18 over with three witnesses from the same department.  
19 There's been no proffer as to what these individuals  
20 would say which would establish any sort of good cause  
21 for relief from Rule 30's ten deposition limit, which  
22 there hasn't been a motion filed to, or for relief from  
23 the stipulation that Mr. Busch himself entered into. And  
24 so we would -- and so we oppose the request to take these  
25 two additional depositions.

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 THE COURT: Rebuttal?

2 MR. BUSCH: Your Honor, very briefly.

3 On the record we talked about the fact that neither  
4 side -- or I made clear that the other side would not  
5 be raising the ten deposition limit. We agreed that  
6 the depositions would go forward and that we would  
7 extend the deadline.

20 So I guess my point is that there's --  
21 since there is absolutely no prejudice to taking these  
22 depositions, and since by their own request they want to  
23 postpone identifying who their witnesses will be on very  
24 important topics that we'll get to in a moment, there's  
25 absolutely no prejudice to not allowing these depositions

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 to go forward. And they are essential to the case,  
2 because as third parties who are no longer associated  
3 with Universal, we feel like they will be more likely to  
4 tell the truth, I would say.

5 MR. KLAUS: First of all, the agreement  
6 with respect to the ten deposition limit, carved out  
7 the 30(b)(6)s, but it was reached with respect to other  
8 individuals in the case.

9 The second is, is obviously there's  
10 expense and inconvenience, certainly of traveling to  
11 Nashville for a deposition of Mr. Hernandez, and there's  
12 additional expense in terms of preparing for a deposition  
13 of another witness.

14 And what we still haven't seen in the  
15 statement of undisputed issues or any other statement, is  
16 any indication of why it is that there's a belief that  
17 Mr. Ferrante will have information that other individuals  
18 in the case have not.

19 Mr. Busch just said, "He's a former  
20 employee, and we therefore think that he will be more  
21 forthcoming." Patricia Blair is a former employee. He  
22 took her deposition and now wants to take another one  
23 from somebody who reported to her. And we don't see the  
24 need to do it, and particularly not where the parties had  
25 already entered into not just a stipulation at a

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 deposition, but a subsequent stipulation saying that  
2 identified the universe of potential opponents.

3 MR. BUSCH: Since Mr. Klaus has baited  
4 me on saying he wanted a proffer on Mr. Ferrante and  
5 Mr. Hernandez, if Your Honor would like one, I would be  
6 happy to give it.

7 THE COURT: No, in light of the rule --  
8 in light of the fact that the ten deposition limit is  
9 reached and no motion to exceed the limit was filed,  
10 I'm disinclined to just grant carte blanche.

11 On the other hand, you're going to be in  
12 New York. You've already deposed three members of  
13 copyright department. I can't imagine that the  
14 preparation for Ferrante is going to -- going to be that  
15 unduly burdensome. I'm going to grant the motion in  
16 part, and allow the deposition of Ferrante on the New  
17 York date that's already been set, a three-hour  
18 deposition.

19 And the deposition for Hernandez is not  
20 granted, short of a motion to exceed the time and a  
21 showing of cause why it wasn't taken care of earlier in  
22 the case.

23 MR. BUSCH: Yes, sir. Thank you, Your  
24 Honor.

25 MR. KLAUS: I want to add -- I can talk

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 about this with Mr. Busch afterwards, but at the risk  
2 of pushing this, we had also -- there were some  
3 documents that were produced by the plaintiffs in the  
4 case after the deadline and Mr. Busch had agreed to  
5 make Mr. Martin available for deposition the same day  
6 in New York. If it would be possible for the Ferrate  
7 deposition and the Martin depositions to be two hours  
8 each in the morning, then the Levinson four hours in  
9 the afternoon?

10 MR. BUSCH: That's fine with me, Your  
11 Honor.

12 THE COURT: Two hours.

13 MR. KLAUS: Thank you, Your Honor.

14 MR. BUSCH: That brings us to the  
15 30(b) (6) notice of Aftermath. And it also brings us to  
16 the other summary judgment, the summary judgment  
17 schedule. Right now, Your Honor, we have stipulated,  
18 although the Court has not entered it yet, changing  
19 the response date for our motion for summary judgment  
20 -- or for their motion for summary judgment to the 24th  
21 of June.

22 And speaking to Mr. Klaus today, there is  
23 a concern that Mr. Klaus has identified, that he can not  
24 get witnesses that would be responsive to some of these  
25 topics in sufficient time that we can take their

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 deposition and be able to incorporate any testimony into  
2 our response for summary judgment.

3 And one topic in particular is very  
4 important. Your Honor, with respect to Subject Matter  
5 Number Two, Subject Matter Number Two is,

6 "Whether the mechanical license  
7 signed by Joel Martin for the song  
8 "Lose Yourself" was ever  
9 countersigned by UMG or otherwise  
10 approved and whether it is now in  
11 effect."

12 A bit of background on that is very important, Your  
13 Honor. Remember, it is the position of Universal in this  
14 case that the controlled composition clause in a  
15 recording agreement that FBT, which is also owned by Mr.  
16 Martin and Eminem, gives them the right to exploit these  
17 compositions through digital download. That's their  
18 position in this case.

19 Shortly after the original FBT agreement  
20 with Aftermath was entered into in 1998, there were no  
21 permanent downloads in 1998. There was no I-Tunes, there  
22 was no commercially viable, lawful, permanent download  
23 service where these downloads were a means of  
24 distribution or licensing of the compositions for sale.

25 In 2002, when permanent downloads began to

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 be a means to license and sell compositions and sound  
2 recordings, Universal had the controlled composition  
3 clause that they thought that it applied to digital  
4 downloads. However, they contacted Mr. Martin, and they  
5 asked him to sign a digital download license specifically  
6 for "Lose Yourself," the song "Lose Yourself."

7 There was a negotiation that took place  
8 after Mr. Martin received that license request. It was  
9 ultimately agreed that Mr. Martin would sign the  
10 requested license based upon a two-year term, a right to  
11 terminate and other conditions. It drafted a license, a  
12 negotiated license, not the license that Universal sent,  
13 but a negotiated license that had a two-year term, and a  
14 right to terminate and several other conditions within  
15 it.

16 Our position is that if the controlled  
17 composition clause at issue in this case actually granted  
18 digital distribution rights, the right to license these  
19 songs for digital downloads, there would be no need for  
20 them to have entered into this license with a two-year  
21 term.

22 The testimony of both Ms. Blair and Mr.  
23 Martin was -- and Ms. Blair was the head of the copyright  
24 department who negotiated this, was that the parties  
25 agreed this would be a trial process for digital

*EIGHT MILE STYLE v. APPLE COMPUTER*

1                   downloads that would only be for this one particular  
2                   song.

3                   UMG never -- or we don't have a returned,  
4                   signed copy of that mechanical license. UMG then sent us  
5                   over the course of the next several years, requests for  
6                   permanent download licenses that Mr. Martin never signed,  
7                   never executed. This is -- if Universal did in fact sign  
8                   this "Lose Yourself" license and if Universal believes  
9                   it's now in effect, that would, in our view, be strong  
10                  evidence that they understood that the controlled  
11                  composition clause did not implicate digital rights.

12                  So we need a witness in responding to  
13                  summary judgment to testify about (a), whether the song,  
14                  "Lose Yourself" was -- the mechanical license signed by  
15                  Mr. Martin was ever signed by UMG. No one who we've  
16                  deposed so far knows whether it was otherwise approved by  
17                  Universal. No one who we've testified knows -- who's  
18                  testified so far knows, and whether Universal believes  
19                  it's now in effect. Again, no one who has testified on  
20                  behalf of Universal has said they have any knowledge on  
21                  that whatsoever.

22                  Mr. Klaus offered to search to see whether  
23                  they could locate a countersigned "Lose Yourself"  
24                  mechanical license. Of course, our position would be  
25                  this litigation has been going on for months now, if not

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 longer, and they should have produced it originally and  
2 they should have looked for it originally. But the point  
3 is, is that we need a witness on this, and it is  
4 absolutely essential to have that in order for us to  
5 respond to summary judgment.

6 So what I would ask, Your Honor, is that  
7 either Mr. Klaus be compelled to produce a witness to us  
8 almost immediately on these topics and the other topics  
9 that we have been discussing here today, some of them  
10 we've agreed not to require a witness, some they've  
11 agreed to produce a witness. We're still taking about  
12 it. Or we would ask that our -- the time for our  
13 response to the Motion For Summary Judgment be extended.

14 And Mr. Klaus has said he would agree to  
15 that, so that we can get a witness on this topic, which  
16 is essential, and any other topic that the parties agree  
17 or the Court orders a witness be produced.

18 MR. KLAUS: Your Honor, first of all, I  
19 disagree with a great deal of the information that Mr.  
20 Busch just said about the import of the "Lose Yourself"  
21 license, about the plausibility of there being a test  
22 case when Eminem compositions have been obviously  
23 available on I-Tunes for many years, or his  
24 representations about Ms. Blair saying that there was  
25 an express agreement that there was a test case.

*EIGHT MILE STYLE v. APPLE COMPUTER*

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 us to come here for hearing in person or without the need  
2 for a hearing, and that we would then be agreeable to an  
3 acceptable extension of his time to respond to the  
4 summary judgment motion.

5 THE COURT: This is the date set for the  
6 hearing on the motion and you've had chances to meet  
7 and confer. Why is it that -- if you haven't reached  
8 an agreement, why should I believe you're going to  
9 reach an agreement?

10 MR. KLAUS: The reason for it is, Your  
11 Honor, is that the Aftermath 30(b) (6), there's nothing  
12 about it in the motion to compel papers. Our  
13 objections to this were served on May the 30th. We did  
14 not -- we did not start discussing the meet and confer  
15 in terms of putting together the list of unresolved  
16 issues, until Monday night. We continued to work  
17 through the interrogatories and the request for  
18 production, almost all of which we've actually reached  
19 an agreement and we've come to a resolution on.

20 Mr. Busch and I started talking about the  
21 Aftermath 30(b) (6) depositions this afternoon. I think  
22 that there's reason to believe that we would reach  
23 resolution on it, Your Honor. And if we didn't, there  
24 would at least be the opportunity for each party to put  
25 in some form of a written statement which says, "Here's

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 our position as to this request," instead of going through  
2 them point by point, where there may be no need for the  
3 Court's resolution.

4 MR. BUSCH: Your Honor, I think there's  
5 one or two things I have to clear up here, but I don't  
6 want to leave the Court with the idea that I waited  
7 until this afternoon -- or the parties waited until  
8 this afternoon to discuss this. We served this  
9 30(b)(6) notice on the defendants in the middle of May.  
10 They served their objections on May the 30th.

11 I have been out in California with Mr.  
12 Pomerantz, which is Mr. Klaus' partner, for depositions  
13 throughout the second half of the month of May, and then  
14 the first week of June. There were several occasions  
15 when I asked Mr. Pomerantz, we were planning on  
16 discussing this and the other topics that ultimately  
17 became the Motion to Compel, following our depositions,  
18 and each time -- and I don't want to put this entirely on  
19 Mr. Pomerantz, but each time, after his witness was  
20 deposed, it was late in the day, and he decided, "Let's  
21 not have the conversation. Let's do it some other time."

22 Then when we -- at the day of Pat Blair's  
23 deposition, we identified this 30(b)(6) matter as  
24 something that needed resolution and would be resolved  
25 today, would be resolved today if the parties could not

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 reach a resolution on it.

2 My problem with this is, unlike some of  
3 the documents or interrogatories, they can't -- they  
4 should have been looking for a witness for these topics  
5 for the last month. And if you hear Mr. Klaus, he's just  
6 going to start thinking about who the witness might be  
7 and has not offered up who the witness is. They've got  
8 to know who their witness is, who's going to know whether  
9 UMG ever countersigned "Lose Yourself."

10 "Lose Yourself" is a huge song. It was  
11 the biggest song from the "Eight Mile" movie. It is a  
12 huge song. It is one of the most important documents in  
13 this litigation, whether Universal approved it. They're  
14 just starting to look for witnesses now.

15 THE COURT: Was there a document request  
16 for that license?

17 MR. BUSCH: We produced it. We produced  
18 the -- yes, we --

19 THE COURT: You're looking for a signed  
20 one?

21 MR. BUSCH: Yes, for all licenses they  
22 had, any licenses, everything. And nothing has been  
23 produced.

24 And Mr. Klaus said to me today, "Well,  
25 we'll do a double secret look later."

*EIGHT MILE STYLE v. APPLE COMPUTER*

8 And we would ask that if they can't get a  
9 witness to us on these topics that we've agreed to, and I  
10 think we will reach resolution on most of these topics  
11 that are here, that we be allowed some additional time to  
12 respond to summary judgment, which he's agreed to, which  
13 he's okay with if the Court is okay with it.

19 The Magistrate Judge system is subordinate  
20 to the District Judge bench. I decide what Judge Taylor  
21 tells me to decide, and the parties can't agree to submit  
22 things to me in the absence of a motion and expect me to  
23 respond to it.

24 MR. BUSCH: Your Honor, just to make it  
25 very clear, in our stipulation that we filed setting

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 this hearing for today and what we've submitted to the  
2 Court, this was one of the issues that we actually did  
3 submit to the Court. The resolution of 30(b) (6) was  
4 one of the items listed.

5 THE COURT: Well, you meet and confer  
6 and see what you can work out. By way of guidance, I  
7 will say that I have long been and remain a proponent  
8 of broad discovery. Absent some good cause why I  
9 should not require you to produce a witness on these  
10 subject matters, I'm likely to tell you to do it.

11 So with that in mind, you better get  
12 together and talk this thing through. You can submit a  
13 list if you want. If you can't agree on something, I'll  
14 review it, not likely to call you back for a hearing. So  
15 make it good and make it short, because this is not the  
16 way these matters are to be addressed.

17 MR. BUSCH: Thank you, Your Honor. The  
18 only thing is, is that on the summary judgment issue,  
19 on a response, I'm getting a little bit nervous about  
20 that, because right now our request was based upon  
21 where we stood a couple of weeks ago, that we be  
22 allowed to have until the 24th to respond to their  
23 summary judgment motion. That -- and that was part of  
24 our stipulation. That has not been signed yet.

25 THE COURT: I consider it part of the

*EIGHT MILE STYLE v. APPLE COMPUTER*

1 agreement.

2 MR. BUSCH: Okay. So could we -- can we  
3 stipulate, can we submit something to Your Honor if we  
4 agree on the dates for these depositions we're talking  
5 about and that we needed to respond, a new schedule for  
6 our response and their reply?

7 THE COURT: Any objection to that?

8 MR. KLAUS: As I indicated to Your  
9 Honor, we will meet and confer.

10 And just so there is no misunderstanding  
11 about this, it's not just a question of -- the question  
12 here is not meeting and conferring to figure out the  
13 dates for deponents and we haven't had peoples' calendars  
14 open. It's that there are issues with respect to the  
15 scope of these -- I take to heart what Your Honor has  
16 said about your view of discovery. We'll work often with  
17 Mr. Busch to try to get this issue resolved without the  
18 need to have to come back.

19 THE COURT: Very well.

20 MR. BUSCH: And I'm not sure he answered  
21 Your Honor's question directly. I just want to make  
22 sure he doesn't object to extending the --

23 THE COURT: He doesn't. He's already  
24 said he doesn't, and he won't.

25 MR. BUSCH: Okay.

## *EIGHT MILE STYLE v. APPLE COMPUTER*

1 THE COURT: There will be an extension.  
2 If it's not stipulated, I'll take care of it. But I'll  
3 be very disappointed if that's necessary.

4 MR. BUSCH: Thank you, Your Honor.

5 THE COURT: Thank you.

10 MR. BUSCH: Thank you, Your Honor.

11 MR. KLAUS: Thank you, Your Honor.

12 THE COURT: Thank you.

13 (At 3:57 p.m., court in recess)

14 \* \* \*

15

16

17

18

19

20

81

*EIGHT MILE STYLE v. APPLE COMPUTER*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12

13 **C E R T I F I C A T I O N**

14 I, Marie J. Metcalf, Official Court  
15 Reporter for the United States District Court,  
16 Eastern District of Michigan, Southern Division,  
17 appointed pursuant to the provisions of Title 28,  
18 United States Code, Section 753, do hereby certify  
19 that the foregoing is a correct transcript of the  
20 proceedings in the above-entitled cause on the date  
21 hereinbefore set forth.

22 I do further certify that the foregoing  
23 transcript has been prepared by me or under my direction.

24 \s\Marie J. Metcalf \_\_\_\_\_

25 Marie J. Metcalf, CSMR-3274, CVR, CM

(Date)